SUPREME COURT, U. S.
FILED
JUL 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS,
Petitioner

versus

THE HONORABLE JAMES R. MEYERS,
Respondent

On Writ of Certiorari To The 169th Judicial District Court of Bell County, Texas

BRIEF FOR THE RESPONDENT

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THE OPINION BELOW

No formal opinion was filed by the court below, the 169th District Court of Bell County, Texas. A formal judgment was entered by such court and is reproduced as Appendix A of the Petition for Writ of Certiorari at pages 27-29.

JURISDICTION

The formal jurisdictional requisites would seem to be satisfied.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena dueces tecum, issued in a civil case, and which demands a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution where the witness does not own the magazines.
2. Whether an attorney can be held in contempt for advising his client to disobey a direct order of a Court to produce materials previously called for by a subpoena duces tecum where there is no valid self-incrimination privilege.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the Fifth Amendment privilege against self-incrimination, the Ninth Amendment residuum of individual rights and the Fourteenth Amendment due process clause are involved.

Also involved are the Texas obscenity statute and the Texas contempt statute.

The revelant portions of the constitutional and statutory provisions are reproduced in Appendix A of the Brief for Petitioner.

STATEMENT OF THE CASE

The judgment for contempt grew out of civil injunction proceedings filed in the 169th Judicial District Court of Bell County, wherein the State of Texas sought to enjoin the sale of certain named magazines, the State alleging that such magazines were obscene. (Appendix 2.) The proceeding was authorized by Article 527 of the Texas Penal Code of 1925 as the statute was then written.

One Michael McKelva was the operator of the store where the magazines were kept for sale to the public. (A. 2, 9, 17.) McKelva was subpoenaed by the State of Texas, the subpoena ordering him to appear in court with some 47 named magazines. (A. 2.) McKelva declined to produce the magazines asserting that he was not the owner thereof, that such magazines might be obscene and that their production would tend to incriminate him. (A. 5, 17, 18.) McKelva further said that he was acting according to the advice of counsel, Petitioner herein. (A. 18.).

The state court, Judge Clawson sitting at that time, then gave a direct order to McKelva to produce the magazines at 1 PM, and recessed the court to give McKelva time to obtain and produce the magazines sought by virtue of the subpoena duces tecum. (A. 20.)

When the court reconvened, McKelva again did not produce the magazines, asserting that he would not do so and further advising the court that he was acting on advice of counsel, the Petitioner. (A. 22, 23, 27.) The

state judge, Judge Clawson, found McKelva, Petitioner and another counsel for McKelva guilty of contempt. (A. 23, 29.)

Pursuant to Article 1911a, Vernon's Texas Civil Statutes, the contempt against Petitioner, who is an attorney, must be reviewed by another district judge. This was done by the Honorable James R. Meyers, Respondent herein, who entered judgment on September 28, 1973, affirming Judge Clawson's initial judgment of contempt and setting the $500.00 fine. (A. 40.) It should be noted that Judge Meyers found as a fact that Maness had advised McKelva not to obey the second order of Judge Clawson ordering McKelva to produce the magazines as called for by the subpoena. (A. 37, 38.)

ARGUMENT AND AUTHORITIES

1. The Magazines Subpoenaed Which Were Displayed For Sale To The Public, Are Not Private Books And Papers So As To Support A Claim For Self-Incrimination

It should first be noticed that the proceeding involved was civil in nature, the purpose being to enjoin the sale of obscene magazines, and so there was no absolute prohibition against the use of a subpoena duces tecum as would have been true if McKelva was a defendant in a criminal case. Second, the witness, McKelva, did not own the magazines. And third, the magazines were openly displayed for sale to the public. These facts make it abundantly clear that the magazines which were

subpoenaed can in no way be equated with the private books-and-papers, self-incrimination principle as defined by *Boyd v. United States,* 116 U.S. 616 (1886).

Observation is initially made that the privilege against self-incrimination does not apply here since the magazines were owned by a third party. *Johnson v. United States,* 228 U.S. 457 (1913). See also Rule 206 of the Model Code of Evidence, American Law Institute and *Bellis v. United States,* infra. The fact of non-ownership alone destroys any claim of the privilege in this case.

Moreover, what a person exposes to the public, here the magazines that were the subject of the subpoena, should not be entitled to the constitutional protection given by the self-incrimination clause to a person's private papers. See *Katz v. United States,* 389 U.S. 347 (1967); *Lewis v. United States,* 385 U. S. 206 (1966); Rule 231 (b), Model Code of Evidence, American Law Institute; *Anderson v. Coulter,* 499 P.2d 103 (Ariz. Sup.Ct. 1972), cert. den. 410 U. S. 990.

Finally, the claimed Fifth Amendment justification for McKelva's failure to produce the subpoenaed magazines would seem to be completely destroyed by this Court's decision in *Bellis v. United States,* ____ U. S. ____, 42 L. W. 4788 (1974). There, after a discussion of earlier Supreme Court cases, it was stated and held:

> "These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual

from compulsory incrimination through his own testimony or personal records.' *United States* v. *White, supra,* at 701. *White* is only one of the many cases to emphasize that the Fifth Amendment privilege is a purely personal one, most recent among them being the Court's decision last Term in *Couch* v.*United States,* 409 U.S. 322, 327-328 (1973). Relying on the fundamental policy limiting the scope of the privilege, the Court in *White* held that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.' 322 U. S., at 699."

Clearly, McKelva's self-incrimination claim has less body and substance than the claim rejected in *Bellis* and should likewise be rejected by this Court. McKelva had no privilege to assert and his refusal to produce the subpoenaed materials as ordered by the state court was properly punishable as contempt.

2. The Contempt Conviction Against McKelva Being Proper, Since McKelva Had No Valid Self-Incrimination Privilege, The Contempt Conviction Against Petitioner for Advising McKelva To Disobey The Court's Order, Is Likewise Proper

It is important to keep this case in perspective. McKelva was ordered to produce 47 magazines by subpoena duces tecum at a State hearing to enjoin the sale of obscene materials. The defense claimed that such magazines might be interpreted as being obscene and were therefore self-incriminatory. Accordingly, Petitioner advised McKelva not to produce said magazines under the subpoena duces tecum and when

McKelva appeared at the State District Court, he so advised the court, noting that he was claiming his privilege against self-incrimination on the advice of his counsel.

After McKelva failed to produce the magazines pursuant to subpoena and advised the court that he was doing so on the advice of counsel, the court then ordered him directly, in open court, to produce the magazines and adjourned court in order to permit McKelva to comply with the court's order. When court reconvened, McKelva again refused to produce the magazines pursuant to the court's direct order, again acting on the advice of counsel to disobey this second, direct order to produce the magazines. It was this second disobedience of the court's order that produced the contempt citation against McKelva and caused the court to hold Petitioner in contempt for advising this second flaunting of the court's ruling.

The state court's order to produce the magazines should have been obeyed (even if, for the purpose of argument, the order was illegal), and counsel should not have been given by Petitioner to McKelva to disobey the order. This conclusion is required since the courts must be the referee of proceedings before them and cannot permit the parties and lawyers to make judicial decisions contrary to the judgment of the courts. *Walker v. City of Birmingham,* 388 U. S. 307 (1967); *Howat v. Kansas,* 258 U. S. 180 (1922); Rule 204, American Law Institute's Model Code of Evidence.

In the instant case, McKelva *might* (no one knows since the subpoenaed magazines were not produced)

have been asserting the self-incrimination privilege for magazines such as Good Housekeeping, Boy's Life and Popular Mechanics. Courts simply must have the power to require production of the material for which the privilege is claimed in order to pass on the efficacy of the privilege in any particular case. (The rule as compelling a testimonial answer may be otherwise, as argued by Petitioner at pages 47, 48 of his Brief (although the rule has been severely criticized by legal scholars, e.g. Wigmore, infra, § 2271, page 419, et seq.), but with reqard to the production of documents, the compelling of their production seems clearly to be judicially countenanced. *Bellis v. United States,* supra.)

Notice should be made that McKelva would not have been surrendering an irretrievable Fifth Amendment right by complying with the subpoena duces tecum and the court's direct order to produce the magazines (as claimed by Petitioner). As Respondent urges, a court must have the power to decide the privilege (just as it has the power to make other rulings on the law) or a trial would become a shambles. But where a judge makes an erroneous ruling as to the privilege against self-incrimination and compels a witness to answer, the witness' privilege is not "irretrievably lost." The correct prophylactic rule is suggested by Wigmore on Evidence, the McNaughton revision, Volume VIII, § 2270, pages 417-419, as follows:

> "Where the witness has properly made his claim of privilege and it has been erroneously overruled, evidence of his testimony is inadmissible against

him in any subsequent proceeding. While such erroneously compelled disclosure does not immunize the witness against prosecution for any crime to which the discloure relates, there are dicta in the opinions supporting the proposition that it may render inadmissible any 'fruit of the poisonous tree.' "

The foregoing rule solves the dilemma of the competing interests of orderly trials managed by the judge and protecting the self-incrimination privilege of a witness.

However, McKelva, having the duty to obey the court's order to produce the subpoenaed magazines, having no valid privilege against self-incrimination (or arguendo, having the duty to produce the magazines even though the court's order was erroneous in overruling the claimed privilege), an attorney, as an officer of the court, logically has a a higher duty to avoid the obstruction of justice by not advising disobedience of a court order.

In *Petition for Green,* 175 N. E.2d 59 (Sup. Ct. Ohio 1961), rev. on other grounds, 369 U.S. 689 (1962), the Supreme Court of Ohio sustained the contempt conviction of an attorney who had advised his labor union clients to disobey a trial court's injuction prohibiting them from picketing at a certain location. The court observed:

"An individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void. But does not an attorney stand in a somewhat different position? He is an officer and

> arm of the Court and as such has a duty to recognize and uphold the orders of the court as long as such orders stand. Consequently, an attorney who brashly advises his client to disobey an existing court order is in contempt of court notwithstanding any vulnerability that may attach to such order." *Id.*, at 62.

Although counsel had the right to advise his clients that, in his opinion, the court lacked jurisdiction to issue the order,

> ". . . when he went further and told them to disobey the order, which they did, he laid himself open to the contempt charge." *Id.*, at 63.

Although the United States Supreme Court reversed, 369 U.S. 689 (1962), it did not question the trial court's imposition of the contempt citation, but only the lack of procedural due process which attended its imposition.

A number of other courts have adjudged attorneys in contempt for advising a client to disobey a court order. In *Anderson v. Comptois,* 109 F. 971 (9th Cir. 1901), a federal appellate court affirmed the contempt conviction of an attorney who advised a client to disobey a writ of supersedeas. Counsel may validly advise his client that a court's order is void,

> ". . . but he is guilty of contempt if he goes beyond the right to advise in matters of law, and, actuated by a spirit of resistance, counsels or conspires with his client or others to disobey an order of court and obstruct its enforcement." *Id.*, at 974.

The Supreme Court of Colorado rule, in *People ex rel. Alexander v. District Court of 10th Judicial District,* 68 P. 242 (Sup. Ct. 1901) that,

> "[a] n attorney who advises a course to be taken by parties, which, when followed, results in a contempt, is himself guilty of a contempt." *Id.,* at 263.

See also *Holt V. McLaughlin,* 210 S.W.2d 1006 (Sup.Ct.Mo., 1948).

Finally, in a recent California case, *In re Bongfeldt,* 99 Cal. Rptr. 428 (Ct.App. 1972), in which an insurance claims adjuster refused to answer certain deposition questions and was as a result held in contempt, the middle-level appellate court decried the trial court's failure to cite for contempt the adjuster's attorney:

> "In our view, were the contempt of each to be weighed, that of the attorney would be the greater. In such cases courts should not hesitate also to impose contempt sanctions upon the errant attorney." *Id.,* at 435.

Here, Petitioner was entitled to advise McKelva that a court's order to produce the magazine was in his (Petitioner's) opinion void, but where Petitioner went farther and advised McKelva not to obey the order, such action was contemptuous of the court and supports the conviction that is the subject of the certiorari.

CONCLUSION

McKelva did not have a privilege against self-incrimination to assert to account for the non-production of the subpoenaed magazines since they were owned by a third party. In any event, the privilege was waived by the public display of the magazines. Moreover, the state court must have the opportunity to pass on the privilege, an opportunity denied to the court in this case by the refusal of McKelva to produce the magazines. Ergo, McKelva was in contempt of court and Petitioner was, accordingly, properly convicted of contempt for advising McKelva to commit contempt.

The judgment of the state district court holding Petitioner in contempt should be permitted to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Brief for the Respondent have been deposited in the United State Mail, postage prepaid, first class, certified, on this the _____ day of July, 1974, to: William F. Walsh, 1955 Richmond Avenue, Houseon, Texas 77006.

LONNY F. ZWIENER
Assistant Attorney General